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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 220

W. L. BRIDGES, SR.,
Petitioner,
versus
THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, W. L. Bridges, Sr., prays that a Writ of Certiorari issue to review the judgment of The Court of Criminal Appeals of Texas, entered in Cause number 34,054, and the above entitled case on April 4, 1962.

Citations to The Opinion and Action Below

The opinion of the Court below is as yet unreported, and it, on original submission, and upon Motion for Rehearing, is printed in Appendix B hereto, infra pp. 18-19. There was no opinion by the District (Trial) Court. The trial was before the Court without a jury. (R. 14-15).

So much of the record in the two Petitions for Certiorari respectively as is common to both cases is not reprinted in the Appendices to this Petition, but is referred to where printed in the Petition in Cause No. 34,053.

Jurisdiction

The judgment of the Court of Criminal Appeals affirming petitioner's conviction was returned January 3, 1962. (R. 29, printed in Appendix B hereto, infra pp. 19-20). Rehearing was denied with written opinion (R. 85-87; opinion printed in Appendix B of Petition in Cause No. 34,053, p. 59; order overruling printed in Petition in Cause No. 34,053, p. 60).

Under the Rules adopted by The Court of Criminal Appeals, Rule VI, (R. 95, printed in Appendix A of Petition in Cause No. 34,053, pp. 14-15), the appellant is entitled as a matter of right to file a Second Motion for Rehearing within fifteen (15) days from the overruling of the First Motion for Rehearing.

The First Motion for Rehearing was filed January 17th, 1962, within the time required by law (R.

30); petitioner filed, with leave of Court, his Amended Motion for Rehearing on February 19, 1962 (R. 33). Said Motion as amended was overruled by written opinion February 28, 1962.

Second Motion for Rehearing was filed March 15, 1962 (R. 88); and overruled without written opinion by judgment entered April 4, 1962 (R. 93-94; printed in Appendix B of Petition in Cause No. 34,053, pp. 62-63).

It is from this last final judgment of April 4, 1962 to which petition for certiorari is taken.

Petitioner promptly (April 6, 1962) filed a Motion for Leave to File Third Motion for Rehearing or in the Alternative for Stay Pending Certiorari to The Supreme Court of the United States (R. 97-105); which was not filed or allowed (R. 112).

Upon sworn application (respondent making no opposition), on April 18, 1962, mandate was stayed by Associate Justice Black (R. 106-107).

The jurisdiction of The Supreme Court is invoked under 28 U.S.C., Section 1257 (3).

How Federal Question Raised

The point that petitioner did not get a fair trial because his counsel was disqualified to advise him to plead guilty and take the blame in the case and accept punishment in lieu of his son, his joint defendant, in order that the son might receive a pro-

bated sentence, was raised for the first time on the Amended Motion for Rehearing in The Court of Criminal Appeals (R. 33-40).

In this connection the Statement of Facts, being a transcript of the trial in the District Court, was tendered to the Court of Criminal Appeals in order to show that the trial in the lower court was no trial at all, but a mere mockery (R. 41-81, printed in Appendix B of Petition in Cause No. 34,053, pp. 25-59).

The Court of Criminal Appeals permitted the filing of the Amended Motion but refused to permit filing of, or to consider, the transcript of the testimony in the trial court (opinion, R. 86); even though petitioner contended the Texas Statute (Texas Code of Criminal Procedure, Art. 759a, Sec. 1, E) makes it the duty of the trial judge to file a statement of facts.

On Second Motion for Rehearing (Paragraph 3, R. 89-90), petitioner presented the point that the interpretation placed by The Court of Criminal Appeals denied petitioner a fair trial, by prohibiting the consideration of the transcript of the testimony by the appellate court, and thus preventing petitioner the opportunity of demonstrating that he had been denied due process and had not had a fair trial in the trial of his case below. In McBee v. United States, 361 U.S. 537, the Supreme Court held that an appellant "is as a matter of due process 'assured of some appropriate means' of making manifest the

basis of his claim that the District Court committed error."

Questions Presented

1. In a case where the petitioner and his son were both indicted, the son for embezzlement from an insurance company of property over $50.00, and the father for selling an unregistered security (Cause No. 34,053) and also for embezzlement from the insurance company of property over $50.00 (Cause No. 34,054); and the petitioner and his son were represented by the same attorney; and petitioner, on the advice of said attorney, pled guilty to both offenses of which he was charged in order that his son might receive a probated sentence in his offense; and no trial was actually held, but both cases were heard together without any testimony except from petitioner and his son, without affidavits or other testimony of guilt, but upon stipulation of counsel as to what witnesses would testify if present; and the petitioner received two years in one case and three years in the other, the offenses running consecutively (a total of five years); whether the petitioner had effective assistance of counsel; and whether his trial was no trial at all and he was denied due process, when there was no interrogation of witnesses, and no witnesses at the trial and counsel stipulated what witnesses would swear to, and no defense was made, and counsel advised petitioner to plead guilty without contacting witnesses and going into petitioner's actual guilt, and counsel failed to perfect and prosecute an appeal.

2. Whether petitioner, on appeal by other counsel, was denied due process of law in The Court of Criminal Appeals, by the refusal of the appellate court to consider the record of the trial so that petitioner could demonstrate his trial was a mere mockery.

Statutes Involved

The Constitution of The United States, and the Fourteenth Amendment thereto, are not printed.

No Federal Statute is involved.

The Constitution, Statutes, and Court Rules of the State of Texas are involved:

Constitution of Texas, Article 5, Sec. 5, printed in Appendix A of Petition in Cause No. 34,053, pp. 13-14.

Vernon's Texas Civ. Stats. (1948, as amended), Art. 1806, printed in Appendix A of Petition in Cause No. 34,053, p. 14.

Vernon's Texas Code of Criminal Procedure, Article 759a, Sec. 1, E. being the Acts of 1951, 52nd Tex. Leg., p. 819, Ch. 485, printed in Appendix A of Petition in Cause No. 34,053, pp. 16-17.

Rules of The Court of Criminal Appeals, Rule VI, (Vernon's Tex. Code of Cr. Pr., Vol. 3, pocket parts 1961, p. 127-128), printed in Appendix A of Petition in Cause No. 34,053, pp. 14-15.

Vernon's Tex. Criminal Code, Article 1534, printed Appendix A, infra pp. 14-15.

Statement

The petitioner was tried in The Criminal District Court No. 2, Dallas County, Texas, in Cause No. D-1934-I, State of Texas versus W. L. Bridges, Sr., (R. 13), under an indictment which went to the jury on the second count for embezzlement of funds of a private corporation (R. 5-6, printed Appendix B, infra pp. 15-18). The Texas statute involved is Texas Penal Code, Article 1534, printed Appendix A, infra pp. 14-15.

The petitioner pled guilty, waived a jury, was convicted by the Court, and sentenced to three (3) years in the penitentiary. The sentence was not made concurrent with Cause Number 34,053 (R. 16-17).

At the same hearing petitioner was tried in District Court in Cause Number D-1933-I (appellate No. 34,053), and in which Petition for Certiorari is filed together with this Petition, and also at the same hearing, petitioner's son was tried in Cause Number D-1932-I in the same court (R. 81).

The parties could not agree upon a statement of facts (transcript of the evidence) within seventy-five (75) days as provided by the Texas statute, and the Trial Judge failed to prepare and certify to a statement of facts as required by the statute (Art. 759a, Sec. 1, E, printed in Appendix A of Petition in Cause No. 34,053, pp. 16-17; see affidavit Amend-

ed Motion for Rehearing, printed in Appendix B, in Petition in Cause No. 34,053, p. 25).

The time was extended for filing and approved four different times, until July 14, 1961 (R. 19-22); but no statement of facts was ever prepared and certified to by the "trial judge."

The Court of Criminal Appeals held that the burden is upon the appellant to see that the trial judge files the statement of facts. (R. 86).

The petitioner tendered the statement of facts as prepared and certified to by the Official Court Reporter and the petitioner's attorney on appeal, but not approved by the State's Attorney or the Trial Judge. (R. 73). The Court of Criminal Appeals refused to consider it. (R. 86).

The Statement of Facts is printed in Appendix B of Petition in Cause No. 34,053, pp. 25-59.

The Court of Criminal Appeals has affirmed petitioner's conviction (R. 27-29, opinion printed in Appendix B, infra pp. 18-20); and rehearing overruled (R. 85-87); and second motion overruled. (R. 93).

Reasons for Granting the Writ

The petitioner in this case (Cause No. 34,054, in the Texas Court of Criminal Appeals) was denied even a semblance of a trial.

Petitioner and his son, W. L. Bridges, Jr., were indicted in connection with the same transaction in Causes D-1932-I, D-1933-I, and D-1934-I. The cases were all heard together, and upon the advice of counsel who represented both the petitioner and his son, petitioner shouldered the entire blame, and he received two years in Cause No. D-1933-I, and three years in Cause No. D-1934-I. His son received a probated sentence. There was not even a semblance of a trial. Petitioner testified and took the blame. Counsel testified what certain witnesses would testify to. The son testified that he had never been convicted of a felony. (R. 38, affidavit of petitioner printed in Appendix B of Petition in Cause No. 34,053, p. 25).

Under the Texas Constitution and Statute, Constitution Article 5, Sec. 5, printed in Appendix A, in Petition in Cause No. 34,053, pp. 13-14, and Article 1806, printed in Appendix A of Petition in Cause No. 34,053, p. 14, the Court of Criminal Appeals may consider affidavits to determine its jurisdiction. They had the power to determine whether petitioner received a trial, or was subjected to a mere mock trial.

It was the duty of the trial judge to prepare and certify to the Statement of Facts, after the parties failed to agree in seventy-five (75) days. See: Vernon's Tex. Code of Cr. Pr., Art. 759a, Sec. 1, E. printed in Petition in Cause No. 34,053, pp. 16-17. But though the approval was a mere formality, since the statement of facts was prepared by the official

Court Reporter, the Court of Criminal Appeals refused to consider it.

The petitioner was entitled to some memoranda, as essential to due process, to demonstrate to the appellate court, and this Court, that he did not have a fair trial. This Court in a similar case, McBee v. United States, 361 U.S. 537, reversed the lower court and approved the dissenting opinion of Judge Bazelon in 261 F. 2d 744, and directed reconsideration in light of Johnson v. United States, 352 U.S. 565, where it was held that while the United States is not forced to furnish the defendant with a stenographic transcript of the trial, he is as a matter of due process "assured of some appropriate means". . . . "of making manifest the basis of his claim that the district court committed error."

The Texas Statute, in case of failure to agree within seventy-five (75) days, requires the district judge to prepare and certify to a statement of facts. Where he has refused to do so, what more "appropriate means" could there be to manifest the error in the trail than a transcript of the proceedings certified to by the Official Court Reporter of the trial court.

The question is basic. Did the appellant get a fair trial, or did he instead get no trial at all?

It is elementary that as part of due process, defendant is entitled to effective assistance of counsel, Johnson v. Zerbst, 304 U.S. 458. This is equally well settled by the Court of Criminal Appeals in Martinez

v. State of Texas, 318 S.W. 2d 66, not yet officially reported.

Quoting from Poter v. United States, 298 F. 2d 461 (5th Cir.), our case is "not the sterile one of a defendant claiming that his lawyer could not give unfettered loyalty to his interests merely because he represented other people, good or bad," but our situation goes further. Under the advice of counsel representing both petitioner and petitioner's son, petitioner agreed to "take the rap" for his son. The attorney advised and permitted petitioner to do this, without interviewing or calling witnesses, and by stipulating what absent witnesses would testify to. Such a trial is a mere mockery. See: Frand v. United States, 301 F. 2d 102; Mitchell v. United States, 259 F. 2d 787; Black v. United States, 269 F. 2d 38; Stanley v. United States, 239 F. 2d 765; and Washington v. United States, 297 F. 2d 342.

"The Constitution assures a defendant effective representation by counsel *whether the attorney is one of his own choosing or court appointed.*" (Emphasis ours). See: Porter v. United States, (5th Cir.), 398 F. 2d 461.

The last case cites and relies upon Glasser v. United States, 315 U.S. 60; and Johnson v. Zerbst, 304 U.S. 458; and Johnson v. United States, 352 U.S. 565.

The Fifth Circuit has had this question of effective counsel before it in a series of cases from the State of Texas, and has adhered strictly to the pilot

cases by the Supreme Court and Martinez v. State of Texas, 318 S.W. 2d 66. See: McKenna v. Ellis, 263 F. 2d 35; McKenna v. Ellis, 280 F. 2d 592; McKenna v. Ellis, (by court in banc) 289 F. 2d 928; and McKenzie v. Ellis, 287 F. 2d 549, (reversing 185 F. Supp. 931), where the Martinez rule as to an attorney not in good standing was expressly approved by the appellate court.

Under the circumstances of petitioner's case, the Court of Criminal Appeals of Texas should not have closed its eyes and refused to look at the Court Reporter's transcript of the testimony, in order to determine whether petitioner because of his counsel, had no trial at all, but was shoved off to the penitentiary in an informal agreement between the attorney and the State and the petitioner.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Hume Cofer

HUME COFER

John D. Cofer

JOHN D. COFER
1408 Capital National Bank Bldg.
Austin 1, Texas

ATTORNEYS FOR PETITIONER

June 20, 1962

OF COUNSEL:

DOUGLASS D. HEARNE
Of Austin, Texas

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari has been served upon Respondent by depositing the same in a United States post office, with first class air mail postage prepaid, addressed to the counsel of record for Respondent, namely Hon. Leon Douglas, States Attorney for the Court of Criminal Appeals.

John D. Cofer

John D. Cofer
Counsel for Petitioner

ENTRY OF APPEARANCE

The undersigned, Hume Cofer, and John D. Cofer, 1408 Capital National Bank Building, Austin 1, Texas, both members of the Bar of the Supreme Court of the United States, hereby enter their appearance in the captioned cause on behalf of Petitioner, Douglass D. Hearne, 1408 Capital National Bank Building, Austin 1, Texas, is of counsel.

Hume Cofer

Hume Cofer

John D. Cofer

John D. Cofer
Counsel for Petitioner

APPENDIX A

TEXAS PENAL CODE, ARTICLE 1534.

"ART. 1534 (1416) (938) (786) EMBEZZLEMENT

"If any officer, agent, clerk, employè, or attorney at law or in fact, of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employè of any private person, copartnership or joint stock association, or any cosignee or bailee of money or property, shall embez-

zle, fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or propetry. Acts 1858, P. 182; Acts 1876, P. 9."

Other Statutes involved are copied in Appendix A to the Petition in Cause Number 34,053.

APPENDIX B

1. INDICTMENT (R. 5-6)

A TRUE BILL
Filed 9/12/60

"IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 2 of Dallas County, at the July term, A. D., 1960, that one W. L. Bridges, Senior on or about the 29 day of March in the year of our Lord One Thousand Nine Hundred and 60, and anterior to the presentment of this indictment, in the County and State aforesaid, did unlawfully and fraudulently take twenty thousand dollars which is of the aggregate value of over fifty dollars, the same being the

aggregate value of over fifty dollars, the same being the corporeal personal property of Hughes Imperial Funeral Insurance Company, a Local Mutual Aid Association, duly organized under the laws of the State of Texas, from the possession of the said Hughes Imperial Funeral Insurance Company without the consent of the said Hughes Imperial Funeral Insurance company and with the intent to deprive the said Hughes Imperial Funeral Insurance Company of the value thereof, and with the intent to appropriate it to the use and benefit of him, the said W. L. Bridges, Senior.

"AND THE GRAND JURORS AFORESAID, good and lawful men of the County of Dallas, and State of Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said County of Dallas, upon their oaths do further present in and to the Criminal District Court No. 2, of Dallas County, at the July Term, A. D., 1960, of said Court that one W. L. Bridges, Senior, on or about the 29 day of March, in the year of Our Lord One Thousa d Nine Hundred and 60, and anterior to the presentment of this indictment, in the County and State aforesaid, was the agent servant and employee of Hughes Imperial Funeral Insurance Company, a Local Mutual Aid Association duly organized under the laws of the State of Texas, and the said W. L. Bridges, Senior, did then and there fraudulently embezzle, misapply and convert to his own use, without the consent of the said Hughes Imperial Funeral Insurance Company certain money, to wit, twenty thousand dollars which is

of the aggregate value of over fifty dollars belonging to the said Hughes Imperial Funeral Insurance Company, which said money had come into the possession of, and was then under the care of, the said W. L. Bridges, Senior, by virtue of such employment as such agent, servant and employee; as aforesaid, AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present in and to said Court, at the said term thereof, that one W. L. Bridges, Senior, on or about the 29th day of March, A. D., 1960, and anterior to the presentment of this indictment, in the County and State aforesaid was an officer, agent and employee of Hughes Imperial Funeral Insurance Company, a Local Mutual Aid Association, duly organized under the law of the State of Texas and the said W. L. Bridges, Senior, did then and there willfully borrow, withhold and divert from its purpose a special fund or a part thereof, to wit, a mortuary fund in the aggregate value of over fifty dollars, belonging to and under the control and management of the said Hughes Imperial Funeral Insurance Company, which special fund had been set apart by law of the State of Texas for a specific use, Against the peace and dignity of the State.

/s/ L. A. Beecherl
Foreman of the Grand Jury

"HENRY WADE
Criminal District Attorney of
Dallas County, Texas

"ENDORSEMENT OF INSTRUMENT: State Witnesses: Hughes Imperial Ed Miller No. D-1934-I, The State of Texas vs. W. L. Bridges, Sr., Theft over

$50.00 and Embezzlement over $50.00, A true Bill, L. A. Beecherl, Foreman of the Grand Jury. Filed Sept. 12, 12:59 P.M., 1960, Bill Shaw, District Clerk, Dallas County, Texas, by McCormick, Deputy.

2. OPINION OF THE COURT OF CRIMINAL APPEALS OF JANUARY 3, 1962 (R. 27-28).

"Appellant was convicted upon his plea of guilty before the court without a jury of the offense of embezzlement of corporeal personal property of the value of $50, or over, and his punishment assessed at confinement in the penitentiary for a term of three years.

"No statement of facts of the evidence adduced upon the trial accompanies the record and there are no bills of exception.

"Appellant's sole contention on appeal is that the indictment fails to charge an offense. Such contention is urged as fundamental error, appellant having filed no exception or motion to quash the indictment in the trial court.

"The second count of the indictment under which appellant stands convicted, omitting the formal parts, charged that on or about the date alleged, the appellant:

> '. . . was the agent, servant and employee of Hughes Imperial Funeral Insurance Company, a local Mutual Aid Association duly organized under the laws of the State of Texas, and the said W. L. Bridges, Senior, did then and there fraudulently

embezzle, misapply and convert to his own use, without the consent of the said Hughes Imperial Funeral Insurance Company certain money, to wit, twenty thousand dollars which is of the aggregate value of over fifty dollars belonging to the said Hughes Imperial Funeral Insurance Company, which said money had come into the possession of, and was then under the care of, the said W. L. Bridges, Senior, by virtue of such employment as such agent, servant and employee, as aforesaid, . . .'

"The indictment follows the language of the statute defining the offense of embezzlement, Art. 1534, V.A.P.C. and is sufficient.

"We overrule appellant's contention that the indictment is insufficient because it does not allege that appellant embezzled the money with the intent to deprive the owner of the use and benefit of the same. Such is not a necessary allegation in charging the offense of embezzlement. 16 Tex. Jur., par. 134, p. 146; 21 Tex. Jur. 2nd, par. 87, p. 682; Leonard vs. State, 7 Texas App. 417.

"The judgment is affirmed."

3. JUDGMENT AFFIRMING (R. 29).

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the

appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

4. CERTIFICATE OF CLERK OF THE COURT OF CRIMINAL APPEALS (Material Portion, R. 112)

"I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in our Cause No. 34,054, styled,

W. L. BRIDGES, SR., APPELANT

versus

THE STATE OF TEXAS, APPELLEE

judgment of the Criminal District Court No. 2 of Dallas County, Texas, was affirmed on January 3, 1962, Appellant's Motion for Rehearing overruled February 28, 1962, Appellant's Second Motion for Rehearing overruled, without written opinion, April 4, 1962, and, on April 19, 1962, Order received from Hon. Hugo L. Black, Associate Justice of the Supreme Court of the United States, staying mandate of this Court pending the filing and disposition of a petition for writ of certiorari.

"THEREFORE, with the overruling of Appellant's Second Motion for Rehearing, this cause was disposed of by this Court on April 4, 1962, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas in criminal cases, and said

judgment has now become final on the docket of this court. Mandate would have issued had it not been stayed on Order of the Supreme Court of the United States."